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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-687

DANIEL SILVA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinion Below.

The opinion of the court below (App. A) is not yet reported.

Jurisdiction.

The judgment of the court below was entered on October 8, 1971. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

Question Presented.

Whether the consent by one of the parties to a telephone communication, which is required for a third party to intercept and divulge such communication under 18 U.S.C. Sec. 2511(2)(c), is satisfied by an informer giving his consent only because he was promised suspended sentences by government authorities on criminal charges pending against him.

Statutes.

18 United States Code, Sec. 2511(2)(c).
18 United States Code, Sec. 2515.
26 United States Code, Sec. 4705(a).
28 United States Code, Sec. 1254(1).

Statement.

Petitioner was charged in a two-count indictment with selling heroin not in pursuance of a written order of the person to whom such narcotic was sold on a form issued by the Secretary of the Treasury or his delegate, all in violation of 26 U.S.C. Sec. 4705(a). During the trial, your petitioner objected to the testimony of a government agent who overheard a telephone conversation between a witness-informer and your petitioner on the ground that the consent given by the witness-informer was not voluntary consent as required by 18 U.S.C. Sec. 2511(2)(c). The trial judge overruled your petitioner's objection and allowed the agent's testimony as to the telephone conversation he overheard. After a jury trial, your petitioner was found guilty on February 18, 1971, on both counts. On March 5, 1971, your petitioner was sentenced to a term of im-

prisonment of eight years. On March 9, 1971, judgment and commitment was entered by the trial judge.

Reasons for Granting the Writ.

The court below upheld petitioner's conviction on a finding that the witness-informer had given his voluntary consent to have the telephone communication intercepted by a government agent.

This case presents an important and far-reaching issue in that it is customary government and police policy to use informers who are facing criminal charges to obtain information concerning other people by having said informers place telephone calls and allowing government agents to intercept said communications. Petitioner submits that there also appears to be a split among the Circuit Courts on whether the consent given by an informer facing criminal charges who is promised lenieney is the voluntary consent required by 18 U.S.C. Sec. 2511(2)(c). The First Circuit in the present case has now stated that such a promise of leniency does not make the consent involuntary (App. A). The District of Columbia Circuit in the cases of *United States* v. *Laughlin*, 222 F. Supp. 264 (D.C. D.C., 1963), *United States* v. *Zarkin*, 250 F. Supp. 728 (D.C. D.C., 1966), and *United States* v. *Jones*, 433 F. 2d 1176 (D.C. Cir., 1970) appears to say that a promise of leniency to an informer renders the consent involuntary. Thus, if the writ is granted, the law on this point could be clarified so that a uniform rule would apply throughout the country.

Title 18 U.S.C. Sec. 2511(2)(c), states the following:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party

to the communication or one of the parties to the communication has given prior consent to such interception."

Title 18 U.S.C. Sec. 2515, states in part as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . ... if the disclosure of that information would be in violation of this chapter."

Therefore, if no prior consent was given to the interception in this case, then no part of the contents of such communication should have been received in evidence at the petitioner's trial.

Authorization to a listening by either party to a call satisfies the statute. *Rathbun* v. *United States,* 355 U.S. 107 (1957). However, if the consent by the sender was coerced or given in return for a promise of leniency, this does not constitute an authorization under sec. 605 (now governed by 18 U.S.C. Sec. 2511(2)(c)).

> *United States* v. *Laughlin,* 222 F. Supp. 264 (D.C. D.C., 1963).

In the *Laughlin* case, the witness who gave the consent to have the call monitored was given an implied promise that she would not be indicted for perjury if she cooperated and, therefore, the conversations were not admissible as against the defendant. In the case of *Weiss* v. *United States,* 308 U.S. 321 (1939), the authorization for wiretapping given by the witness when there was a clear hope of leniency which hope was deliberately created by an As-

sistant U.S. Attorney and by the deputy foreman of the grand jury under the implied threat of being indicted if she did not cooperate, did not constitute the kind of authorization contemplated by sec. 605. The Supreme Court has held unanimously that sec. 605 contemplates voluntary consent and not enforced consent and not enforced agreement to publication. *Weiss* v. *United States, supra,* at 330.

In our case, it is submitted that the informer, Mr. Sullivan, did not give his voluntary consent to have his telephone conversations monitored. Mr. Sullivan had been arrested on various charges sometime in March or April of 1970 (Tr. first day, p. 20 through p. 21). Mr. Sullivan testified that if he worked with the Government, he was promised a suspended sentence and probation, and it was on that promise that Mr. Sullivan decided to work with the Department of Justice (Tr. first day, p. 21). It is submitted that our case falls squarely in line with the decisions that hold that authorization given by one who has been given implied promises of leniency is not the kind of authorization contemplated by sec. 605. The witness-informer in our case, Mr. Sullivan, pleaded guilty on June 4, 1970, in the Suffolk Superior Court before Mr. Justice Rose to the charge of possession of heroin with intent unlawfully to sell. Mr. Sullivan pleaded guilty and received a suspended sentence of 5 to 7 years. Mr. Sullivan testified in our case that the Government promised that they would put a word in for him at this trial so that he would get a suspended sentence (Tr. first day, p. 25 through p. 26). Clearly, the witness-informer was promised leniency if he allowed the Government to monitor his telephone conversation and this is not voluntary authorization under sec. 605.

In the case of *United States* v. *Zarkin*, 250 F. Supp. 728 (D.C. D.C., 1966), the informant was awaiting sentencing

and he approached the police with an offer to make phone calls and allow the Government to monitor the conversations. The police captain would make no promises of leniency if the informer helped the Government and, in fact, the captain said the informer could expect no cooperation by the police. The United States Attorney would make no promises either, but stated that he would let the court know that the informant helped the Government. The informant decided to make the calls and allowed the Government to overhear them. The court decided that the consent was voluntary since it was not coerced and there were no promises of leniency and, in addition, it was the informer who initiated the negotiations. However, the court stated that its holding was limited to the question of whether authorization is involuntary if given in *hope of leniency*. 250 F. Supp. 728, at 736. The court left open the question as to whether authorization is involuntary if given as the result of an official *promise of leniency*. 250 F. Supp. 728, fn. 15, at 736. A promise of leniency distinguished the case. The court further stated:

> "The Court would restrain the use of police coercion and of promises of leniency; and we would restrain the arm of the law from extending out into the community in search of the weak and the vulnerable who might be persuaded to authorize official monitoring of their telephone lines." 250 F. Supp. 728, at 737.

Thus it appears that when a promise of leniency is given, the court would invalidate the consent because such a promise is in fact coercion.

In the case of *United States* v. *Jones*, 433 F. 2d 1176 (D.C. Cir., 1970), the court stated that the informant's consent was voluntary because in that case, too, the informer only expected hope of some leniency and there were no

promises made. It appears clear that all the cases on this point distinguish between promises of leniency and a mere hope of leniency on the part of the informer.

The recent case of *United States* v. *White,* U.S. Sup. Ct. April 5, 1971, 9 Crim. Law Rptr. 3036, decided that an agent's testimony of conversations overheard on a transmitter worn by an informer with the informer's consent was admissible. The *White* case does not control our case because the issue of the informer's consent was not before the court.

United States v. *White, supra,* fn. 1, at p. 3037. The petitioner respectfully submits that the witness-informer, Sullivan, did not voluntarily consent to have the telephone conversations monitored and that the testimony of the agents should have been excluded at the trial and that this constitutes grounds for reversal. Even though the witness-informer himself testified as to the conversations, the testimony of the listening agent carries great weight with the jury, whereas the informer's testimony alone would not carry such great weight. The listening agent's testimony is not merely cumulative, but adds great credence to the witness-informer's testimony. As the court below stated,

> "We agree that the evidence was prejudicial if improperly received, but we hold it was not."

Therefore, it is submitted that the conviction should be reversed because the monitoring agent's testimony is not merely cumulative but was, we believe, a great factor in the jury's deliberations, and the evidence was improperly received.

Conclusion.

Petitioner contends that consent induced by promises of leniency and/or suspended sentences from a government agent is not the voluntary consent required by 18 U.S.C. Sec. 2511(2)(c) and the cases cited above. Furthermore, this court could clarify the law on this area so that all the Courts of Appeals could render a uniform decision on this point throughout the country.

For the reasons hereinabove set forth, petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. PARIS.

Of Counsel:

MARTIN K. LEPPO.

APPENDIX A.

United States Court of Appeals for the First Circuit.

No. 71-1073.

UNITED STATES OF AMERICA,
APPELLEE,
v.
DANIEL SILVA, JR.,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE AND COFFIN, *Circuit Judges*.

Michael A. Paris, with whom *Martin K. Leppo* was on brief, for appellant.

Allen R. Hoffman, Assistant United States Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, was on brief, for appellee.

October 8, 1971

ALDRICH, *Chief Judge*. In response to a promise, which we assume for present purposes he thought was enforceable

(and which in fact was lived up to) that he would receive a suspended sentence with respect to a matter as to which he had already been indicted, one Sullivan agreed to telephone the defendant, and to permit the overhearing and recording by a government agent of an unlawful conversation. At his trial on a narcotics charge under 26 U.S.C. §4705(a) the defendant contended that the recording was not an admissible wiretap under 47 U.S.C. §605 and the rule of *Rathbun* v. *United States*, 1957, 355 U.S. 107, because the consent, having been induced by a promise of leniency, was not voluntary. The district court ruled against him and admitted the evidence. Defendant was convicted and now appeals. We agree that the evidence was prejudicial, if improperly received, but we hold it was not.

Defendant has a mistaken conception of involuntariness. A defendant who pleads guilty because he expects, or hopes, thereby to obtain a more palatable sentence than he might otherwise face, is not, per se, pleading involuntarily. Indeed, this is so even though he at the same time asserts his innocence, provided there is strong evidence of guilt. *North Carolina* v. *Alford*, 1970, 400 U.S. 25; *cf. United States* v. *Bednarski*, 1 Cir., 1971, 445 F. 2d 364. In the present circumstances, to establish involuntariness the defendant's burden is to show that Sullivan's will was overcome by threats or improper inducement amounting to coercion or duress. *Kent* v. *United States*, 1 Cir., 1959, 272 F. 2d 795, 799 ("Threats or promises of illegitimate action."); *see also United States ex rel. Dixon* v. *Pate*, 7 Cir., 1964, 330 F. 2d 126, 128, cert. denied 379 U.S. 891; and *McClure* v. *United States*, 9 Cir., 1965, 332 F. 2d 19, cert. denied 380 U.S. 945. The record discloses nothing of that character. We do not view a promise of leniency with respect to a pending indictment as coercive, at least in the absence of evidence that the indictment had been improperly brought.

To the extent, if any, that it could be thought that views in the District of Columbia may differ from ours regarding such promises, *see United States* v. *Laughlin*, D.D.C., 1963, 222 F. Supp. 264; *cf. United States* v. *Zarkin*, D.D.C., 1966, 250 F. 2d 728; *United States* v. *Jones*, D.C. Cir., 1970, 433 F. 2d 1176, 1180, we decline to follow them. We do not believe, however, that we are in the disagreement defendant suggests.

Defendant's remaining two points of error are without merit. His claim of per se prejudice by an unexplained two-month delay between offense and indictment goes far beyond any cited case. It presents no possible question. *See United States* v. *Stamas*, 1 Cir., 1971, 443 F. 2d 860, 862. Defendant also complains that the trial court abused it discretion in making an unnecessary repetition in charging the jury. We have examined the charge and see no error. *Cf. Harris* v. *United States*, 1 Cir., 1966, 367 F. 2d 633, 636, cert. denied 386 U.S. 915.

Affirmed.

APPENDIX B.

18 United States Code, Sec. 2511(2)(c):

"It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

18 United States Code, Sec. 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

26 United States Code, Sec. 4705(a):

"(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for the purpose by the Secretary or his delegate."

28 United States Code, Sec. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of two counts of selling heroin, in violation of 26 U.S.C. (1964 ed.) 4705 (a), and sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. A).

The facts adduced at trial showed that on April 9, 1970, one Sullivan, an informer, telephoned petitioner from the Bureau of Narcotics and Dangerous Drugs in Boston and ordered five bundles of heroin (Tr. 1,

pp. 3-7).[1] It was agreed that the heroin would be left in a phone booth behind a public library (Tr. 1, pp. 6-7). Federal agents, who had monitored the conversations with Sullivan's permission, accompanied him to the phone booth and found the heroin there (Tr. 1, pp. 7-8, 74; Tr. 2, p. 15). The next day Sullivan, accompanied by Agent Wheeler, contacted petitioner and paid him $500 for the heroin (Tr. 1, pp. 13-14, 82).

On April 15, 1970, Sullivan placed another call to petitioner and arranged for five more bundles to be left in a certain telephone booth on Boylston Street. This time petitioner told Sullivan to leave the money at Frankie O'Day's bar (Tr. 1, p. 16). Sullivan and the agents found the heroin in the booth (Tr. 1, p. 17; Tr. 2, p. 18) and left $500 with the bartender at Frankie O'Day's (Tr. 1, pp. 18, 89).

At the trial, the agents testified about the telephone conversation that they overheard between Sullivan and petitioner. Petitioner's sole contention is that the overhearing of the conversation by the agents was illegal under the applicable statute (18 U.S.C. 2511 (2)(c)). He argues that Sullivan's consent was coerced, since it was obtained in response to a promise by the government that he would receive lenient treatment if he cooperated. As the court below pointed out, however, promises of leniency do not constitute coercion, and accordingly the consent was valid and the agents' testimony was properly received. See

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[1] "Tr. 1" and "Tr. 2" refer, respectively, to the transcripts of the first and second days of the trial.

Good v. *United States*, 378 F. 2d 934 (C.A. 9); *McClure* v. *United States*, 332 F. 2d 19, 22 (C.A. 9), certiorari denied, 380 U.S. 945.

We also agree with the court below that the cases from the District of Columbia relied on by petitioner (Pet. 3-4, 6-7) do not conflict with this view. Indeed, the only court of appeals case (*United States* v. *Jones*, 433 F. 2d 1176 (C.A. D.C.), certiorari denied, 402 U.S. 950) held that the authorization for police monitoring involved there, which was granted in the hope and expectation of leniency, was nonetheless uncoerced and freely given. While none of those cases involved an actual promise of leniency, the courts below correctly concluded that, in the circumstances of this case, the promise of leniency was not an improper inducement and did not make Sullivan's consent involuntary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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